Sri Palmar Development & Construction Sdn Bhd v Jurukur Perunding Services Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22–1536 OF 2002
LEE SWEE SENG JC
13 JULY 2010

Professions — Land surveyors — Remuneration — Fees — Whether land surveyors obliged to charge clients based on scale fees prescribed by the Licensed Land Surveyors Regulations 1959 — Whether land surveyors may agree to fee lower than scale fees — Whether land surveyor's agreement on discounted fees with client against public policy — Whether land surveyor's agreement on discounted fees with client in conflict with structure and scheme of scale fees under the Licensed Land Surveyors Act 1958 and Licensed Land Surveyors Regulations 1959

The plaintiff appointed the defendant to carry out certain title survey works. The parties orally agreed that the defendant's fee would be RM100,000, which sum was subsequently raised to RM130,000. However, the defendant later claimed there was no such agreement and that the full fees payable was RM219,245, calculated according to the Schedule 13 of the Licensed Land Surveyors Regulations 1959 ('the Regulations'). Further, the fees were to be paid to the Land Surveyors Board ('the board') pursuant to reg 99(1) and (2) of the Regulations before the defendant commenced the survey work. The plaintiff sued for damages for repudiatory breach of its contract with the defendant. The defendant applied for a speedy determination of issues under O 14A of the Rules of the High Court 1980 ('RHC'). The issue for the High Court's determination was whether a land surveyor and his client could agree to the payment of a lesser fee than the prescribed scale fees under the Regulations.

Held, dismissing the defendant's application with costs:

(1) The scale fees is recommended fees and regulated in the sense of preventing overcharging. If there is justification for going below the scale, there is no reason why charging fees below the scale could not be valid and permissible. If the professional body in the instant case had wanted a no discount rule to be applicable, clear, unequivocal and unambiguous language should have been used in the Regulations, such as for the example the words used in r 6 of the Solicitors' Remuneration Order 2005. There was no such prohibition in the Regulations 1959 (see paras 15–17); *Mott Macdonald (Malaysia) Sdn Bhd v Hock Der Realty Sdn Bhd* [1996] MLJU 342 reffered.

(2) Regulation 99(1) read with Schedule 13 of the Regulations was not drafted in a negative or imperative fashion and there was no express prohibition against or penalties for charging lesser than scale fees (see paras 20–21); *M Pentiah and others v Muddala Veeramallappa and others* AIR 1961 SC 1107 reffered.

(3) The rationale of scale fees being there to protect the client and the public is a mistaken notion that ought to be debunked. If it is to protect the client then the client should be given the freedom of choice both in the latitude and liberty in being able to negotiate on fees (see para 27).

(4) The defendant's argument that public policy dictated a structured scale fees scheme to ensure quality work is done for a reasonable stipend, ignores the market forces of competition and the magnanimous fervour of being a professional. The soon to be gazetted Competition Act 2010 would no doubt strike down monopolistic fee structures and set aside the system and structure of an inflexibly fixed scale fees scheme as being stifling of fair competition (see paras 28–29).

(5) The categories of contracts which are contrary to public policy are not closed. The principles governing public policy must be capable, on proper occasion, of expansion or modification. An inflexible scale fees scheme is today an anachronism, an affront to fair competition and fast becoming a taboo. In the instant case, since there was no express prohibition on giving discounts by licensed land surveyors or to the parties agreeing to a lesser professional fee under the Licensed Land Surveyors Act 1958 ('the Act'), one could not truly say that an agreement on discounted fees was against public policy (see paras 30 & 32).

(6) In the instant case, there was no legal prohibition against agreeing to a fee lower than the scale fees. An agreement on discounted fees was not in conflict with the structure and scheme of scale fees under the Act and Regulations. The defendant's application under O 14A of the RHC ought therefore be dismissed with RM1,000 costs payable by the defendant to the plaintiff (see para 37).

[Bahasa Malaysia summary

Plaintif melantik defendan untuk melakukan kerja-kerja mengukur yang tertentu. Pihak-pihak bersetuju secara lisan bahawa fi defendan adalah sejumlah RM100,000 yang mana kemudiannya dinaikkan kepada RM130,000. Walau bagaimanapun defendan kemudian menyatakan bahawa tidak ada perjanjian sedemikian dan bahawa fi penuh yang perlu dibayar adalah RM219,245, dikira menurut Jadual 13 Peraturan-Peraturan Juruukur Tanah Berlesen 1959 ('Peraturan'). Selanjutnya, fi perlu dibayar kepada Lembaga Juruukur Tanah ('Lembaga') menurut peraturan 99(1) dan (2)

Peraturan tersebut sebelum defendan memulakan kerja mengukur. Plaintif menyaman untuk ganti rugi bagi kemungkiran pembatalan kontraknya dengan defendan. Defendan memohon untuk pemutusan segera isu-isu di bawah A 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Isu yang perlu diputuskan oleh Mahkamah Tinggi adalah sama ada juruukur dan pelanggannya boleh bersetuju bagi pembayaran fi yang kurang daripada skala fi yang ditentukan di bawah Peraturan tersebut.

Diputuskan, menolak permohonan defendan dengan kos:

(1) Fi skala adalah fi yang dicadangkan dan dikawal untuk mengelakkan daripada dikenakan bayaran lebih. Jika terdapat justifikasi untuk pengurangan di bawah skala, tidak ada alasan mengapa fi di bawah skala tidak boleh menjadi sah dan dibenarkan. Jika badan profesional di dalam kes ini memerlukan peraturan tiada diskaun beraplikasi, bahawa yang jelas dan nyata sepatutnya digunakan di dalam Peraturan, contohnya seperti perkataan-perkataan di dalam k 6 Kaedah-Kaedah Saraan Peguamcara 2005. Tidak ada larangan sedemikian di dalam Peraturan tersebut (lihat perenggan 15–17); *Mott Macdonald (Malaysia) Sdn Bhd v Hock Der Realty Sdn Bhd* [1996] MLJU 342 dirujuk.

(2) Peraturan 99(1) dibaca bersama Jadual 13 Peraturan tidak dilakar secara negatif atau imperatif dan tidak ada larangan secara terus terhadap atau penalti untuk meminta bayaran kurang daripada skala fi (lihat perenggan 20–21); *M Pentiah and others v Muddala Veeramallappa and others* AIR 1961 SC 1107 dirujuk.

(3) Rasional bahawa skala fi dibuat adalah bagi melindungi pelanggan dan awam adalah tanggapan salah dan perkara sebenar harus dipaparkan. Jika ia adalah untuk melindungi pelanggan, maka pelanggan sewajarnya diberikan kebebasan untuk memilih dari segi latitud dan kebebasan untuk menawar fi yang dikenakan (lihat perenggan 27).

(4) Hujahan defendan bahawa polisi awam menyatakan bahawa skim skala fi yang berstruktur untuk memastikan kualiti kerja yang dilakukan untuk pulangan yang munasabah, tidak menghiraukan persaingan pasaran dan menunjukkan keghairahan kebaikan hati sebagai seorang profesional. Akta Persaingan 2010 yang akan diwartakan tidak lama lagi tanpa ragu-ragu mematahkan struktur fi monopoli dan mengetepikan sistem dan struktur skala fi yang ditetapkan secara infleksi sebagai menyekat persaingan yang adil (lihat perenggan 28–29).

(5) Kategori kontrak yang bertentangan dengan polisi awam tidak terhad. Prinsip-prinsip yang menentukan polisi awam mestilah boleh, dalam keadaan yang sesuai, dikembangkan atau diubahsuai. Skala fi yang

tidak fleksibel pada zaman ini adalah anakronisme, suatu penghinaan bagi persaingan yang sihat dan cepat menjadi larangan. Di dalam kes ini, oleh kerana tidak ada larangan terus bagi pemberian diskaun oleh juruukur tanah berlesen atau kepada pihak-pihak yang bersetuju dengan fi profesional yang kurang di bawah Akta Juruukur Tanah Berlesen 1958 ('Akta tersebut'), seseorang tidak boleh menyatakan bahawa sesuatu perjanjian atas fi berdiskaun adalah bertentangan dengan polisi awam (lihat perenggan 30 & 32).

(6) Di dalam kes ini, tidak ada larangan dari segi undang-undang terhadap persetujuan dengan fi yang lebih rendah daripada skala fi. Perjanjian bagi fi berdiskaun tidak bertentangan dengan struktur dan skim fi di bawah Akta dan Peraturan tersebut. Permohonan defendan di bawah A 14A KMT oleh itu wajar ditolak dengan kos RM1,000 dibayar oleh defendan kepada plaintif (lihat perenggan 37).]

Notes

For cases on professions generally, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1556–1647.

Cases referred to

A Solicitor, Re [1945] 1 All ER 445, CA (refd)

Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly AIR 1986 SC 1571 (refd)

Enderby Town Football Club Ltd v Football Association Ltd [1971] Ch 591, CA (refd)

In the matter of Phool Din & Ors AIR 1952 Allahabad 491 (refd)

Koid Hong Keat v Rhina Bhar [1989] 3 MLJ 238, HC (refd)

M Pentiah and others v Muddala Veeramallappa and others AIR 1961 SC 1107 (refd)

Mott Macdonald (Malaysia) Sdn Bhd v Hock Der Realty Sdn Bhd [1996] MLJU 342; [1997] 1 CLJ Supp 182, HC (refd)

Richardson v Mellish (1824) 2 Bing 229 (refd)

Sainik Motors v State of Rajasthan AIR 1961 SC 1480 (refd)

State of Uttar Pradesh v Babu Ram AIR 1961 SC 751 (refd)

Vita Food Products, Incorporated v Unus Shipping Company, Limited (in liquidation) [1939] AC 277, PC (refd)

Legislation referred to

Architects (Scale of Minimum Fees) Rules 2010 r 3

Competition Act 2010

Contracts Act 1950 ss 24(a), (b), (e), 25

Indian Contract Act 1872 s 23

Legal Profession (Practice and Etiquette) Rules 1978 rr 51, 52

Licensed Land Surveyors Act 1958

Licensed Land Surveyors Regulations 1959 regs 8, 99(1), (2), 100, 100(3), 101(d), Schedule 13
Rules of the High Court 1980 O 2 r 2(1), (2), O 14A
Solicitors' Remuneration Order 2005 r 6

Tee Han Cheong (Tee & Partners) for the appellant/defendant.
Lim Chong Fong (Azman Davidson & Co) for the respondent/plaintiff.

Lee Swee Seng JC:

PROLOGUE

[1] Many professionals, towards the end of each month, have to make that gentle call to their clients to chase for payment of fees to meet their commitment to staff, landlord and bankers and for cash flow. Some outsource it to others to do while others have a special department in the firm to do just that. Not so our land surveyor friends; they are a more fortunate lot for their fees are paid to the Land Surveyors Board ('the board') in accordance to the prescribed scale before they ever need to commence work.

[2] The question that arises for consideration in this O 14A of the Rules of the High Court 1980 ('RHC') application by the defendant is whether the payment of fees to the board may be less than the prescribed scale. In other words can both the land surveyor and the client agree on a sum less than the scale prescribed and pay the same to the board for work to commence. To put it simply, is the scale of fees prescribed a mandatory scale for all to follow or is it permissible to go below the scale in a case where both the client and the professional land surveyor agree to a lower fee or a discount, a word frown upon by professionals and some may feel insulted if ever their clients were to ask for a discount.

PARTIES

[3] The plaintiff is a housing developer of a 60 acre land in Tanjung Sepat, Mukim Batu, Daerah Kuala Langat, Selangor. The plaintiff alleged that they had appointed the defendant, a firm of licensed land surveyors to do the title survey for the said land leading to the issuance of the sub-divided titles for a fee orally agreed to be RM100,000 which sum was subsequently raised to RM130,000. The defendant stated that there was no such agreement and that the full fees of RM219,245 calculated as per Schedule 13 of the Licensed Land Surveyors Regulations 1959 ('the Regulations') is to be paid to the board as provided for under reg 99(1) and (2) before commencement of the title survey

work.

PROBLEM

[4] Both parties stood their stand and stance in a strategy that resulted in a stalemate. The plaintiff sued for damages for repudiatory breach of the contract engaging the defendant for the title survey work. On 19 September 2003, the plaintiff obtained a mandatory injunction compelling the defendant to issue a release letter to them upon depositing within a week the sum of RM83,658.37 into court. Without the release letter the plaintiff could not proceed to engage a new licensed land surveyor to take over the work of title survey and issuance of the individual titles to the land.

[5] Thereafter the matter went into a lull and it was only on 4 December 2009 that the defendant filed an application under O 14A of the RHC for a speedy determination of a few questions of law which may effectively dispose of the matter.

PRAYERS

[6] In this O 14A of the RHC application, the defendant had sought the court's determination on the following questions of law:

(a) Whether an agreement on discounted fees for title survey work at RM130,000 or at RM100,000 is in conflict with the Licensed Land Surveyors Act 1958 ('the Act') and reg 99(1) and 99(2) of the Regulations?

(b) In the event that the answer to (a) above is in the positive, whether the agreement on a discounted fee is not valid in law and null and void ab initio under s 24(a), s 24(b) and s 25 of the Contracts Act 1950?

(c) In the event that the answers to (a) and (b) above are in the positive, then this action be struck off with cost to be taxed and paid by the plaintiff to the defendant.

PRINCIPLES

[7] The defendant submitted that there are clear and unambiguous wordings in the Act and the Regulations that prohibit giving of discount on fees chargeable on title survey and these can be found in:

(a) Regulation 99(1) of the Regulations: the regulation is couched in mandatory language, 'Every land surveyor making a title survey *shall charge fees as prescribed* in the Thirteenth Schedule hereto'. (Emphasis added.)

(b) Regulation 99(2) of the Regulations: this regulation is also couched in mandatory language and making it compulsory that the client shall deposit the fee with the board and no one else, 'The fee shall be deposited with the Board by the client before the title survey is carried out'.

(c) Regulation 100 of the Regulations: this regulation spells out the penalty to be imposed on land surveyor is the title survey is not completed within six months after the scale fee has been deposited the board. The penalty is serious; suspension of the land surveyor from practice for a period of three months. In such an event, the board may appoint another land surveyor to complete the title survey but still making it mandatory that the fees shall be charged as per the Schedule 13 of the Act and the Regulation. Regulation 100(3) provides, 'The Board may, in any case referred to in sub-regulation (2), order the title survey to be carried out and completed by the Survey Department or another licensed land surveyor and the fee shall be paid in accordance with the provisions of regulation 99'.

(d) Regulation 101(d) of the Regulations further states, 'Every licensed land surveyor shall observe and be guided by the following provisions of the Code of Professional Conduct: every licensed land surveyor other than employees of statutory bodies shall, for making a title survey, be remunerated by the fees payable by his client to the Board under regulation 99(1)'.

[8] It was further submitted by the defendant that by making it compulsory and mandatory for the client of a land surveyor to pay the exact amount of the scale fees charged in accordance with the Schedule 13 of the Regulations to the board, it is the intention of the Act and the Regulations that there shall be no discount on the fees charged on title survey.

[9] The defendant further urged the court that from the clear wordings of the Act and the Regulations, it can be construed that the objective of the said laws is aimed at protecting the interests of the members of the public (for instance, the purchasers of properties in a housing development) in ensuring that they get their final titles (as compared to qualified titles) timeously after the completion of the building. With the issuance of final titles, it will in turn, maintain and enhance the integrity of the Torrens land system in Malaysia. By allowing the land surveyor and/or his client the latitude and liberty to agree on the title survey fees chargeable, whether express or implied, will defeat the said aim of the Act and the Regulations and is plainly against the public policy as well.

[10] What does the word 'shall' mean? Is it more akin to and indeed

A amounting to a 'must' or can it be a mere 'may'? Must the word 'shall' mean a mandatory 'must' or may it mean a directory 'may'? I am reminded of the verbal exchange in Lewis Caroll's *Through the Looking Glass*:

> 'When I use a word,' Humpty Dumpty said, in a rather scornful tone, 'it means just what I choose it to mean, neither more nor less.' ' The question is,' said Alice, 'whether you can make words mean so many different things.' ' The question is,' said Humpty Dumpty, 'which is to be master-that's all.'

[11] I agree that generally the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the context or the intention otherwise demands, as per Hidayatullah J in *Sainik Motors v State of Rajasthan* AIR 1961 SC 1480. Similarly, in *State of Uttar Pradesh v Babu Ram* AIR 1961 SC 751, Subbarao J stated:

> When a statute uses 'shall' prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statue.

[12] In the Privy Council case from Nova Scotia in *Vita Food Products, Incorporated v Unus Shipping Company, Limited (in liquidation)* [1939] AC 277, Lord Wright stated at p 293:

> Illegality is a concept of so many varying and diverse applications, that in each case it is necessary to scrutinize the particular circumstances with precision in order to determine if there is illegality and if so what is its effect. As Lord Campbell said in reference to statutory prohibition in *Liverpool Borough Bank v Turner* (1860) 2 De GF & J 502 at p 507:
>
> > No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statue to be construed.
>
> … Each case has to be considered on its merits. Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds.

[13] Closer home my attention was drawn by the plaintiff's counsel to our very own case of *Mott Macdonald (Malaysia) Sdn Bhd v Hock Der Realty Sdn Bhd* [1996] MLJU 342; [1997] 1 CLJ Supp 182, where at p 195 (CLJ), Abdul Malik Ishak J (as he then was) opined that:

> The consulting engineers in performing any of the professional services described in para 1 of Part A shall be paid in accordance with only one of the following scale fees as described in para 1(1), 1(2) and 1(3) of this Part.

and at p 197 (CLJ):

> Be that as it may, it is my judgment that the plaintiff did not charge the defendant exorbitantly in blatant disregard to the scale of fees set by the Board of Engineers. In actual fact the plaintiff's fees were reasonable and on the lower scale. It seems to me that the object of the scale of fees set by the Board of Engineers is to put in check recalcitrant engineers who wittingly or unwittingly impose exorbitant fees.

[14] The scale fees is what it is, a prescribed and proscribed fees, beyond which is prohibited and punishable with a penalty and below which is permissible though not preferred.

[15] The scale fees is recommended fees and regulated in the sense of preventing overcharging. If there is justification for going below the scale because of bulk work or because of the client being a non-profit body or because of impecuniosity of client or for some other reasons, I cannot see why that cannot be valid and permissible. Basically there cannot be something inherently or intrinsically wrong with a discount unless the legislation expressly prohibits it.

[16] If the professional body had wanted a no discount rule to be applicable they should have stated in clear, unequivocal and unambiguous language as in for example r 6 of the Solicitors' Remuneration Order 2005 which reads:

> There *shall be no discount* on fees specified in this Order. (Emphasis added.)

[17] There is no such prohibition in the Regulations here.

[18] Some other professions like the architects employ the use of a minimum fee structure wherein no member of the profession is allowed to go below the minimum and indeed it provided that higher fees may be charged under certain circumstances with the prior agreement of the client. Rule 3 of the Architects (Scale of Minimum Fees) Rules 2010 of the which came into operation on 1 March 2010 provides under 'Payment of fees' the following:

> Any architectural consultancy practice which is engaged by a client to perform any of the architectural consultancy services specified in Part II *shall not charge less than the scale of minimum fees specified* in Part III in addition to the other payments in Part IV, provided that higher fees, where justified by the architectural consultancy practice's special expertise, experience or standing, may be charged with the prior agreement of the client. (Emphasis added.)

[19] Indeed there are some references to a 'minimum charge' in the Regulations and Schedule 13 thereto for example in Table I of 'Survey of Land for Building' where at para 3(b) it is provided that charge for the preparation of pre-computation plan shall be RM20 per lot, subject to a minimum charge of RM350 per job. These references to a 'minimum charge' are few and far in between and that further underscore the point that if the board had wanted the 'minimum charge' to be applicable throughout all jobs undertaken, they could have employed the 'scale of minimum fees specified' as the architects have done.

[20] In *M Pentiah and others v Muddala Veeramallappa and others* AIR 1961 SC 1107 at p 1113, Subbarao J held:

> Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative.

[21] I agree with learned counsel for the plaintiff that reg 99(1), read together with Schedule 13, is not drafted in a similar fashion nor is there any express prohibition against or penalties for charging lesser than scale fees.

[22] There is yet another way of expressing mandatoriness that leaves no room for the exercise of any residual discretion and that is normally achieved by the use of the word 'must'.

[23] We see this employed in the various provisions in the Rules of the High Court 1980. An example is O 2 r 2(1) and (2) of the RHC where different gradations of a rigorous requirement from a 'directory' may to an 'obligatory' shall to a 'mandatory' must is set out:

> (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein *shall* not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.
>
> (2) An application under this rule *may* be made by summons or motion and the grounds of objection *must* be stated in the summons or notice of motion.

[24] Likewise too in reg 8 on requirements for entering into articles in the Licensed Land Surveyors Regulations:

> (2) Before entering into articles, a graduate *shall* produce evidence that he has obtained any first degree in land surveying from any universities or institutions, as follows:
>
> (a) …

(b) …

(c) …

(d) …

(3) A Malaysian citizen.

(4) Except in the case of the Director General of Survey, a Licensed Land Surveyor *must* have been registered for more than five years with the Board before he can take in any person under articles.

(5) The Board *may*, with the approval of the Minister, from time to time amend, vary, add to, revoke, suspend or revise the requirements for entering into articles as prescribed in the provisions of regulation 8(1) and (2).

[25] If mandatoriness can be measured, then on an increasing scale of it, one would start off with 'may' where there is a minimum of it, progressing to 'shall' where there is much of it and peaking at 'must' where there is a maximum of it.

[26] Conversely, if discretion can be distilled, then on a decreasing scale of it, one would start off with much discretion in 'may' declining to a minimum morsel of it in 'shall' and dropping to 'must' where even a modicum of it is missing altogether.

[27] I must confess that I find it difficult to understand why a system of scale fee is necessary to ensure and enhance the integrity of our Torrens system of title registration. The reverse might well be true: that if developers are allowed to negotiate for a lower fee in the context of bulk work, perhaps with lower fees they can come up with the money to apply for a faster subdivision of titles after the master title has been surveyed. In any event there is no way to prevent the land surveyor from refunding to the client the difference between the scale fees and the negotiated fees after the scale fees have been released to the land surveyor after completion of the title survey work. This rationale of scale fees been there in place to protect the client and the public is a mistaken notion that ought to be debunked. If it is to protect the client then the client should be given the freedom of choice both in the latitude and liberty in being able to negotiate on fees.

[28] It was argued by the defendant that public policy dictates and demands a structured scale fees scheme to ensure quality work is done for a reasonable stipend as stipulated by the board and that one way to shun shoddy work is to secure that scale fees are paid to the board before work commences.

[29] Attractive as that argument is, it fails to take into consideration the

market forces of competition and the magnanimous fervour of being a professional. Why should any profession immune itself from the market forces of free competition? If there ever was a public policy that justify an inflexibly fixed scale fees on the ground of protecting clients and consumers then even public policy here is fast changing with the passage of the Competition Bill 2010 through two houses of Parliament where when enforced as law, matters like cartel and professionals ganging-up to gag negotiation on fees with the help of their professional body and unfair monopolistic fee structures would be struck down by the Commission to be set up under the soon to be gazetted Competition Act 2010. Indeed the system and structure of an inflexibly fixed scale fees scheme would have to be set aside as being stifling and suffocating of fair competition. Why should a professional be less professional in his work merely because he has agreed to a lower scale fees? Why should he be penalised and punished and perhaps even paraded as a pariah of his profession just because he has charged a lower fee but no less professional in his work bearing in mind that until he has completed his work within the stipulated time he cannot get his fees from the board? If a member of the profession wants to charge a lower fee because of his lower cost due to where he is operating from or because he has managed to harness technology to help him in his work, why would any member of his profession wail and wrangle his fist in protestation? Speaking of the legal profession that I am more familiar with, lawyers are known to put in more energy and effort and even exhibit more endurance in cases where they do pro bono work especially in the field of public interest litigation. A profession should distinguish itself in the high standard that it sets for its members to achieve and attain and certainly not by a non-negotiable standard and at times perceived to be steep scale fees.

[30] The categories of contracts which are contrary to public policy are not closed. Whilst it has been said that public policy is a very unruly horse, and when once you get astride it you never know where it will carry you (as per Borough J in *Richardson v Mellish* (1824) 2 Bing 229), it has also been said that with a good man in the saddle, the unruly horse can be kept in control, it can jump over obstacles it can leap the fences put up by fictions and come down on the side of justice (as per Lord Denning MR in *Enderby Town Football Club Ltd v Football Association Ltd* [1971] Ch 591). In *Koid Hong Keat v Rhina Bhar* [1989] 3 MLJ 238 at p 241 Wan Adnan J (as he then was) adverted to a dictum in *Re A Solicitor* [1945] 1 All ER 445 which states, 'the law relating to public policy must change with the passage of time, it cannot remain immutable'. Indeed what was once thought of and treasured as immutable may now be treated as inimical to fair competition and hence ignominious. In the Indian Supreme Court case of *Central Inland Water Transport Corporation Ltd v Brojo Nath Ganguly* AIR 1986 SC 1571 at p 1612, Madon J when dealing with s 23 of the Indian Contract Act which is in pari materia with our s 24(e) of our Contracts Act 1950 said: 'It is … clear that the principles governing public policy *must be and are capable, on proper occasion, of expansion or modification*.

Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy.' Whatever may have been the main motive behind an inflexible scale fees for many a profession, that is now an anachronism and an affront to fair competition. Whilst it was once a trademark of the professions it is now fast becoming a taboo.

[31] In *Koid Hong Keat v Rhina Bhar* [1989] 3 MLJ 238, referring to whether an agreement by the defendant, a solicitor, to pay the plaintiff a percentage of her fees for introducing legal work by way of touting was against public policy and hence ought to be struck down, the court has this to say: 'In my view, before the court can regard touting as opposed to public policy under s 24(e) of the Contracts Act 1950 there must be shown to the court that touting has a tendency to be injurious to the public welfare. The Legal Profession (Practice and Etiquette) Rules 1978 were made by the Bar Council for regulating the professional practice, etiquette, conduct and discipline of advocates and solicitors. They do not apply to other people. The rules were not made by the Parliament. They therefore cannot be taken to reflect public opinion. Has public opinion been expressed in this matter? I have not been informed of and I have not come across any expression of opinion from the public either for or against touting. The society has not shown its abhorrence to touting. If the prohibitions in rr 51 and 52 are statutory provisions I will have no hesitation to hold that touting is injurious to the public welfare because laws are reflections of the public opinion (*In the matter of Phool Din & Ors* AIR 1952 Allahabad 491 (folld)).'

[32] Might it not be said in this case that since there are no express prohibition on giving a discount by a member of the profession of licensed land surveyors or the parties agreeing to a lesser professional fees under the Act, can one then truly say that an agreement on discounted fees is against public policy? There is at best no evidence on that and what the board prescribed for its members which the public has no say over on the matters of fees smacks more of selfishly safeguarding, sanctioning and securing their professional fees than of selfless service to the public.

[33] The Right Honorable Prime Minister Prime Minister Datuk Seri Najib Tun Razak in his speech on 30 March 2010 in launching the New Economic Model had alluded to the fact that professionals have to be more competitive where fees structure are concerned if they are to be successful in vying for work in a global market.

[34] In launching the 10th Malaysian plan on 11 June 2010, the Right Honorable Prime Minister Prime Minister Datuk Seri Najib Tun Razak said:

> In addition, business regulations that are outdated will be abolished. Towards this end, the Malaysian Productivity Corporation ('MPC') will be restructured to spearhead a comprehensive review of business regulations and improve processes and procedures to increase the productivity and competitiveness of major economic sectors.
>
> Healthy competition is needed to make the economy more efficient and dynamic. For this, the Competition Law will be introduced to provide a regulatory framework against market manipulation and cartel practices that may affect market efficiency.
>
> A Competition commission and appeal tribunal will be established to ensure more orderly and effective implementation of the law.

(See *Working Towards A Holistic Change* at http://www.nst.com.my/nst/articles/16rmp/Article/#ixzz0tX8c6qFg (accessed on 12 July 2010)).

[35] There is a palpable paradigm shift that has started and soon inflexibly fixed scale fees system and structure will have to be set aside in favour of fair competition where the customers, consumers and clients will have a choice with fees as a factor to be taken into consideration before engaging the services of a professional. It is to be noted that many jurisdictions have done away with inflexibly fixed scale fees for non-contentious legal work like in UK, Australia, New Zealand and Singapore where competition laws are in vogue.

[36] Further if charging a fee lower than the stipulated scale is to be prohibited, penalised and punished then the Act must criminalise the act and any action or device aimed at achieving or arriving at what is actually a discount. At the very least the Act should state in plain language that any agreement on a discounted fee is null and void and unenforceable and that the member who has indulged in such a practice shall be deemed to have misconducted himself. All that the Regulation punishes is against overcharging and not undercharging or non-charging. I know of no profession that would so criminalise any act or attempt at a discount if indeed it is so obnoxious, abhorrent and anathema to the profession that disgust and aghast have to be sufficiently reflected as in an abomination!

PRONOUNCEMENT

[37] In the light of the above reasons I find that there is no legal prohibition against agreeing to a fee lower than the scale fees. An agreement on discounted fees is not in conflict with the structure and scheme of scale fees under the Act and Regulations. The defendant's application under O 14A of the RHC is hereby dismissed with cost of RM1,000 to be paid by the defendant to the

plaintiff.

POSTSCRIPT

[38] The winds of change are not just blowing in the corridors of commerce and competition but also in the corridors of our courts. This is a 2002 case. Perhaps parties have slipped into slumber land while prosecuting and defending this claim. This will be a thing of the past for any party that so sleep after filing a suit will be awaken from its stupor as the courts under the dynamic leadership of the Right Honourable Chief Justice Zaki Azmi (following the Chief Justice's speech at the Lincoln's Inn dinner on 9 July 2010 given in his honour for being made an honorary bencher that henceforth no titles shall be used in reference to judges in court orders and judgments) proactively and purposefully call up cases long outstanding and fix them for speedy disposal. No stones will be left unturned and no efforts spared until the backlog and clog is cleared and the cases are current. Behold the old is gone and the new has come! Never before have judges and lawyers alike worked so hard to clear the backlog of cases that have clogged up and choked the court system. With this in mind the court has fixed 24 August 2010 as the hearing date for the trial and final disposal of the case.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon